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No. 88-1848

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION, PETITIONER

v.

ARLIE GLEN SKELTON, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER PURSUANT TO RULE 22.6 IN RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

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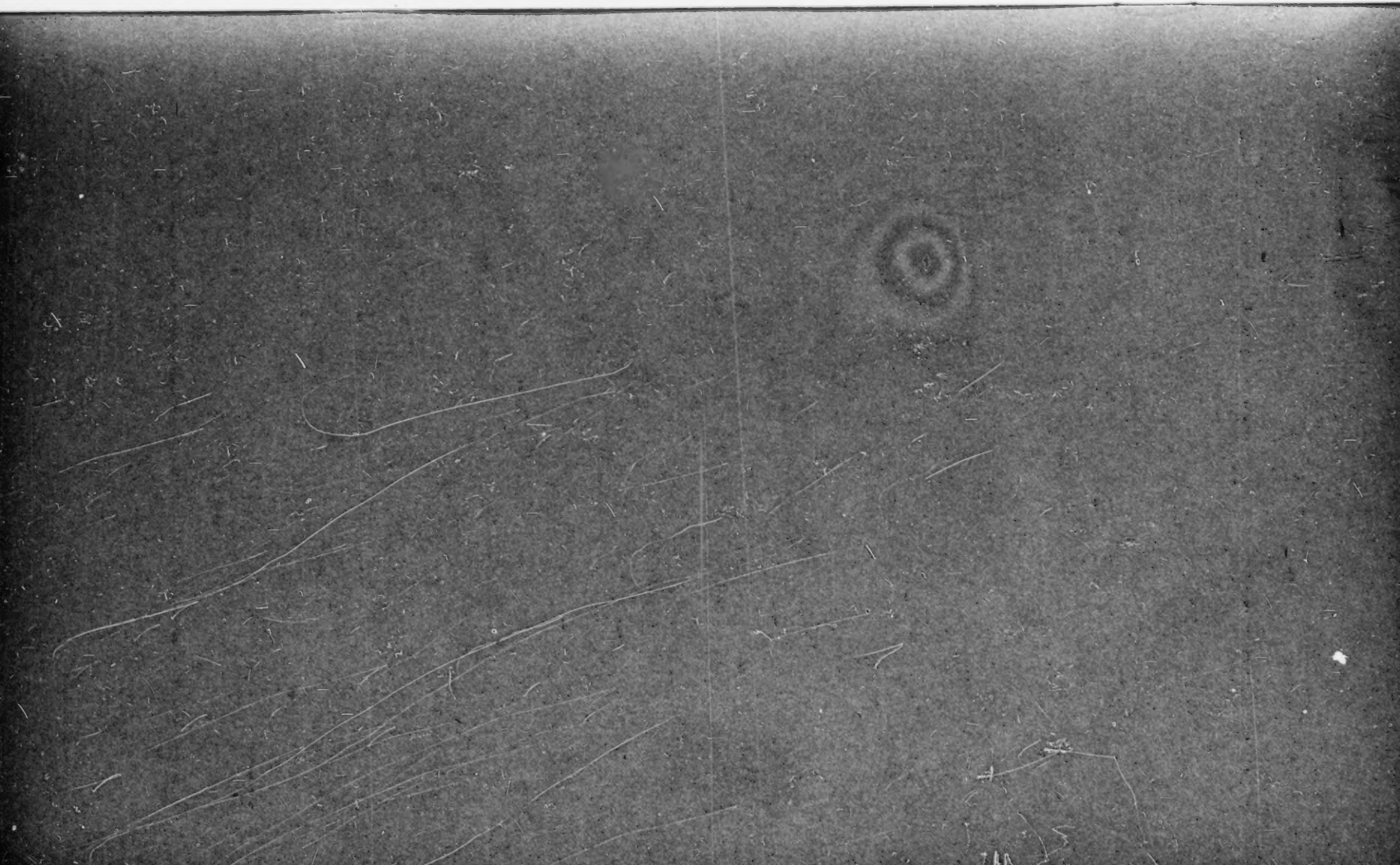


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This brief is filed pursuant to Rule 22.6 of the Rules of this Court to reply to respondents' supplemental brief based on the newly-submitted affidavit of Richard C. Hoyt.

Respondents' brief in opposition challenged GM's standing under Article III to seek review of the attorneys' fee multiplier. We demonstrated in our reply brief that GM does have the necessary standing on several different grounds. Respondents now attempt—based on an eleventh hour affidavit entirely outside the record—to raise the standing issue once again. Nothing in respondents' supplemental brief, however, undermines GM's

standing or provides any basis for the Court to deny review of the important attorneys' fee question presented in the petition for certiorari.

1. Respondents' supplemental brief is directed to only one of the several bases for GM's standing discussed in our reply brief. Accordingly, those other grounds for GM's standing are unrebutted.

Moreover, even as to the one ground that respondents do address, their argument is unavailing. Respondents do not dispute that under the reverter clause, GM has a right to the return of any sums that are unclaimed due to undeliverable, lost, or uncashed checks. See GM Reply Br. 2. Nevertheless, they assert that GM lacks standing because "[a] reversal of the Seventh Circuit's decision will not make *any* additional funds available for reversion to GM" (Resp. Supp. Br. 3 (emphasis in original)). This is simply incorrect.

Respondents assume that a distribution list, if recently compiled, constitutes an infallible means for disbursing funds to claimants. Both common sense and common experience indicate otherwise. Indeed, in this very case, more than $100,000 remained in unclaimed funds after the first distribution to the class in January 1989; and, contrary to the thrust of respondents' supplemental brief, a second distribution in May 1989—some four months after the initial distribution had been made—similarly resulted in thousands of dollars of unclaimed funds.

What is more, the reversal of the fee multiplier and ensuing distribution of those funds would occur not today, as respondents assume, but sometime next year, after the case has been fully briefed and argued and the Court has rendered a decision. Whatever its accuracy at the present time, therefore, the class list "completed in June [1989]" plainly would not be "a current * * * [and] fully updated * * * list" (Resp. Supp. Br. 3) in the spring or summer of 1990. In that circumstance, the

essential premise of respondents' argument disappears, and the existence of unclaimed funds can fairly be anticipated.

Thus, there is no basis in reason or in the record for respondents' cavalier assertion that no funds redistributed from counsel to the class members would ultimately revert to GM. Of course, it cannot be known to a certainty that unclaimed funds will exist; nor can the precise amount of any such funds now be ascertained. But neither of those conditions is necessary to establish Article III standing. Rather, the prospect that some funds will be unclaimed, together with GM's colorable right to that money, is sufficient. See, *e.g.*, *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 481 n.7 (1980); *United States* v. *SCRAP*, 412 U.S. 669, 688-690 & n.14 (1973).

2. Beyond this, respondents' ultimate position is simply untenable because it would mean that, as a practical matter, the fee multiplier awarded to counsel after a class action settlement would go unchallenged in any higher court. Under respondents' theory, the risk bonus of $1.2 million in this case—which dwarfs the average payment of $340 to each class member as shown by respondents' own affidavit (see Resp. Supp. Br. App. 2a, ¶ 3)—would effectively be insulated from further review. The courts that have considered the issue, while relying on a number of rationales, have uniformly held that former adversaries in litigation can challenge fee awards —even if the awards do not affect their total monetary liability—in order to safeguard the interests of plaintiffs that otherwise could not practicably be protected from the claims of their attorneys. See GM Reply Br. 4; see also, *e.g.*, *Jackson* v. *United States*, No. 87-6552 (9th Cir. Aug. 2, 1989) (defendant has standing to challenge attorneys' fee award that would reduce the amount plaintiffs receive under the Federal Tort Claims Act); *Cotter* v. *Bowen*, 879 F.2d 359, 362 n.4 (8th Cir. 1989) (defendant has standing to challenge a fee multiplier pay-

able out of the claimant's social security benefits); *Condon* v. *Bowen*, 853 F.2d 66, 69 n.1 (2d Cir. 1988) (Social Security Act); *Wyatt* v. *United States*, 783 F.2d 45, 46 (6th Cir. 1986) (Federal Tort Claims Act); *Freeman* v. *Ryan*, 408 F.2d 1204, 1205-1206 (D.C. Cir. 1968) (in federal milk order case, defendant has standing to challenge fee award payable out of fund escrowed for plaintiffs).

In sum, respondents have gone to extraordinary lengths to argue that this Court should not decide whether they or their clients are entitled to receive the $1.2 million at issue here. Not only have they filed a supplemental brief in a last-ditch effort to bolster their previous objection to GM's standing, but they have asserted a legal position that essentially would preclude appellate review of many attorneys' fee multipliers. Nothing in respondents' supplemental brief or in their brief in opposition provides any reason for the Court to deny review of the substantial and recurring question presented in this case.

Respectfully submitted.

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